

THE DICHOTOMY OF EXECUTIVE IMMUNITY: A COMPARATIVE ANALYSIS BETWEEN THE UNITED STATES AND GREAT BRITAIN

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I. INTRODUCTION

Politicians get away with murder! This common statement tends to reflect how many feel about the privileged class of people who make and enforce the law. Nevertheless, the litigious nature of the United States has caught up with the current President of the United States, Bill Clinton. He is accused of several state and federal civil rights violations¹ allegedly committed against Paula Corbin Jones, a former Arkansas state employee.² President Clinton was given leave to argue the ruling in *Nixon v.*

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1. Jones' action alleges that Clinton, while Governor of Arkansas, violated her civil and due process rights by sexually harassing and assaulting her in violation of 42 U.S.C. §§ 1983 and 1985 (1988). She also claims that Clinton violated Arkansas state laws by committing defamation and outrage. See *Jones v. Clinton* 869 F. Supp. 690, 691 (E.D. Ark. 1994).

2. *Jones v. Clinton*, 869 F. Supp. 690 (E.D. Ark. 1994).

*Fitzgerald*³ gives him absolute immunity from being sued while holding office, so that Jones' suit should be dismissed without prejudice until after he leaves office. The district court did not agree and held that the President is subject to discovery but the initial trial may be delayed until after he leaves office.⁴

On January 9, 1996, the United States Court of Appeals for the Eighth Circuit, with Judge Bowman writing for the majority, ruled in a two to one decision that the President is subject to the same rules which apply to every American citizen.⁵ The court held that since the actions alleged were not "official acts," *Nixon v. Fitzgerald* could not provide the President any type of immunity in this instance and the pretrial discovery could proceed.⁶ The Circuit Court based its opinion on a strict reading of *Nixon v. Fitzgerald*.⁷ The District Court based much of its decision on what it called the "English Legacy," and on Supreme Court decisions (mainly *Fitzgerald*) to conclude President Clinton does not have full immunity from suit.⁸

The District Court's comparison of English law and history concerning the issue of immunity was used to aid the court in interpreting the intent of the Framers of the Constitution and was thus given more weight than it deserved. On the other hand, the circuit court never touched upon the "English Legacy."

This article will discuss and analyze the fundamental differences between executive immunity in the United States and the United Kingdom of Great Britain and Northern Ireland. The first part of this article will discuss the "American position." This section will analyze the historical development the courts have taken concerning the constitutionality of enjoining, subpoenaing, and suing the President of the United States for actions committed during his term and even before his term commenced. After discussing the American position, the second part of this article, titled, "The British Counterpart", will discuss the formation and role of the modern monarchy, and its retention of certain powers and privileges since the formation of Parliament. The section will also address the civil and criminal immunity the monarch always enjoys and how that immunity can, at times, protect members of the Crown in the course of their executive

3. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (giving the President of the United States absolute immunity for official actions within the outer perimeter of his duties of office).

4. *Jones*, 869 F. Supp. at 698-99.

5. *Jones v Clinton*, Nos. 95-1050, 95-1167, 1996 WL 5658, at *1 (8th Cir. Jan. 9, 1996).

6. *Id.*

7. *Id.* at *3.

8. *Id.* at *1.

duties. Finally, the conclusion will summarize the differences between the British monarch and the American President and allow the reader to determine if the discussed immunity is necessary in today's day and age.

II. THE AMERICAN POSITION

It is often stated the United States is the most litigious nation in the world. This belief is evident by the number of law suits filed and litigated in American courts each year. By 1990, the legal profession became a ninety-one billion dollar a year industry and employed nearly one million people.⁹ The profession has helped give the average person the ability to file suit against anyone, even against the President of the United States.

Until the final days of Richard Nixon's tenure in office, it was believed the President of the United States enjoyed complete immunity from suit.¹⁰ This belief changed over time. In a series of decisions, the President's omnipotent status has been eroded. Nevertheless, the courts have continuously had difficulty in balancing presidential immunity with the need of the judicial branch to administer justice. Several important court decisions have helped shed light on how far the judicial branch may go to exercise its jurisdiction over a president. The following cases indicate the President is subject to some legal process, and is not above the laws of the United States.

III. THE COURT'S SUBPOENA POWER OVER THE PRESIDENT

In *United States v. Burr*,¹¹ the trial court subpoenaed President Thomas Jefferson. Aaron Burr¹² wanted Jefferson to provide a letter which Burr intended to use as evidence to help defend a charge of treason. The government conceded Burr's right to serve the President with a subpoena to testify, but decided that a subpoena *duces tecum* cannot be served on the President because a request for documents could disclose confidential communications which only the President is entitled to read.¹³ With Chief Justice John Marshall presiding, the trial court recognized that

9. ROBERT MACCRATE, *THE PROFESSION FOR WHICH LAWYERS MUST PREPARE—A VISION OF THE SKILLS AND VALUES NEW LAWYERS SHOULD SEEK TO ACQUIRE* 5 (1992) (quoting U.S. Industrial Outlook 1991, Professional Services: Legal Services (SIC81), at 52-54).

10. Laura K. Ray, *From Prerogative to Accountability: The Amenability of the President to Suit*, 80 KY. L.J. 739 (1991).

11. *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,629d).

12. Aaron Burr (1756-1836) was the third Vice President of the United States (1801-1805) under Thomas Jefferson. Burr was accused of trying to raise an army against Spain and conspiring to divide the Union.

13. Ray, *supra* note 10, at 744.

a subpoena *duces tecum* might jeopardize public safety, but held the President must hand over the letter.¹⁴ The court added that portions of the letter may be withheld in the interest of national security.¹⁵ More interesting, Marshall ruled the courts cannot proceed against the President as an ordinary individual.¹⁶ Marshall's decision was revisited when a federal district court ordered President James Monroe to submit to a subpoena and serve as a witness in a court-martial hearing.¹⁷ The Attorney General believed Monroe had a legal duty to cooperate with a subpoena.¹⁸ Claiming he could not leave his official duties, Monroe answered a series of interrogatories which the court sent by mail.¹⁹

Perhaps the most significant case recognizing the courts' power to subpoena the President, thus legitimizing Marshall's decision was *United States v. Nixon*.²⁰ President Nixon challenged a subpoena ordering him to turn over tape recordings of his discussions which were needed for a criminal trial.²¹ Nixon argued that the separation of powers doctrine precluded the court from exercising its jurisdiction over the executive branch.²² In a unanimous decision (without Justice Rehnquist's participation), the Supreme Court held the doctrine of separation of powers and confidentiality do not give the President an unqualified privilege of immunity from the judicial process.²³ The Court noted that unless President Nixon could show the released communications would jeopardize military, diplomatic, or national security interests, his arguments could not prevail over the fair administration of criminal justice.²⁴

14. *Burr*, 25 F. Cas. at 34-35. Chief Justice Marshall wrote the following: "A subpoena duces tecum, then, may issue to any person to whom an ordinary subpoena may issue, directing him to bring any appear of which the party praying it has a right to avail himself as testimony." *Id.* at 34-35.

15. Ray, *supra* note 10, at 750; *see Id.* at 752 n.69 (explaining Burr's concession the "constitutional officer" has a right to withhold certain documents from the public); *see also Burr*, 25 F. Cas. at 35.

16. Ray, *supra* note 10, at 753 (citing *United States v. Burr II*, 25 F. Cas. at 192).

17. RONALD ROTUNDA, MODERN CONSTITUTIONAL LAW—CASES AND FOOTNOTES 281 (4th ed. 1993).

18. *Id.*

19. *Id.*

20. *United States v. Nixon*, 418 U.S. 683 (1974).

21. *Id.*

22. *Id.* at 706.

23. *Id.*

24. *Id.* at 713.

IV. THE COURTS' INJUNCTION POWER OVER THE PRESIDENT

The Reconstruction Act of 1867²⁵ set the battleground for the Supreme Court to hear *Mississippi v. Johnson*.²⁶ Mississippi attempted to enjoin President Andrew Johnson²⁷ from enforcing the Reconstruction Act of 1867.²⁸ The Supreme Court unanimously held a state cannot sue the President to block enforcement of a statute it believes is unconstitutional.²⁹ Furthermore, the court stated that the separation of powers doctrine precludes the courts from exercising its jurisdiction over the executive branch and the Reconstruction Act was purely executive and political.³⁰ Nevertheless, the decision in *Mississippi v. Johnson* did not necessarily preclude the courts from enjoining the President in his performance of ministerial duties or hearing a suit against the President for noninjunctive relief.³¹

It was not until the 1950s when the Supreme Court heard arguments in *Youngstown Sheet & Tube Co. v. Sawyer*³² that *Mississippi v. Johnson* was revisited. President Harry Truman ordered his Commerce Secretary to seize the nation's steel mills when management and labor were unable to resolve a wage dispute which threatened to close down the industry in the middle of the Korean War.³³ In a hearing before the United States District Court, the government argued the precedent in *Mississippi v. Johnson* prohibited the court from exercising its jurisdiction over the President or his agents.³⁴ The District Court ruled against the government but distinguished the current case from *Johnson* on the grounds that the

25. Reconstruction, which lasted from about 1865 to 1877, was the era following the American Civil War (1861-1864) in which the states of South Carolina, Mississippi, Florida, Alabama, Georgia, Louisiana, Texas, Virginia, Arkansas, North Carolina, and Tennessee were reinstated into the Union.

26. *Mississippi v. Johnson*, 71 U.S. (1 Wall.) 475 (1868).

27. Andrew Johnson was the seventeenth President of the United States who succeeded to the Presidency upon the assassination of Abraham Lincoln in 1865. A lifetime member of the Democratic party, Johnson was selected by Lincoln, a member of the Republican party, to give the ticket a non-partisan character. Johnson and the Republican-controlled Congress were constantly at odds with each other, especially where reconstruction was at issue. As a result, Andrew Johnson became the only President to be impeached. The opposition failed by one vote to gain his conviction; thus, Johnson was able to finish out his term in office, which ended in 1869.

28. Ray, *supra* note 10, at 753.

29. *Johnson*, 71 U.S. at 475.

30. *Id.* at 499, 500.

31. *Id.* at 499.

32. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

33. *Id.* at 582.

34. Ray, *supra* note 10, at 760.

complaint named the Commerce Secretary and not President Truman.³⁵ When the case reached the Supreme Court, counsel for the steel mills argued that *Johnson* did not pertain to presidential subordinates and thus an injunction would be permissible.³⁶ The majority opinion did not address whether *Youngstown* was actually a suit against the President; but at the very least it established that one can challenge a presidential order if the named defendant is a presidential agent.³⁷ In the end, the Supreme Court invalidated Truman's executive order stating the Constitution does not authorize the President, as Commander-in-Chief, to seize private property.³⁸ Eventually, the ability to enjoin a presidential order by directly naming the President instead of a "named agent" became acceptable in the eyes of the Court, but it is nevertheless difficult to achieve.³⁹ The same can be said for a writ of mandamus, though difficult to obtain, it is not legally impossible.⁴⁰

V. SUIT AGAINST THE PRESIDENT—NIXON V. FITZGERALD

In 1968, A. Ernest Fitzgerald, a management analyst with the Department of the Air Force, testified before a congressional subcommittee about cost overruns and technical difficulties concerning the development of the C-5A air-transport.⁴¹ When Richard Nixon assumed the presidency in 1969, Fitzgerald's position was eliminated.⁴² Fitzgerald believed his dismissal was politically motivated and challenged his termination before the Civil Service Commission.⁴³ The Commission found Fitzgerald's termination was not in retaliation for his congressional

35. *Id.*

36. *Id.* at 761.

37. *Id.* at 763.

38. *Youngstown*, 343 U.S. at 588; see also Ray, *supra* note 10, at 761-63.

39. See *National Ass'n of Internal Revenue Employees v. Nixon*, 349 F. Supp. 18 (D.C. 1972) (holding that plaintiffs' failed to show that a preliminary injunction to require the President to adjust wages of federal employees was in the public interest); see also *Dellums v. Bush*, 752 F. Supp. 1141 (D.C. 1990) (holding that members of Congress were not entitled to a preliminary injunction directed to the President prohibiting him from initiating military action against Iraq because the issue was not ripe for consideration).

40. See *San Francisco Redevelopment Agency v. Nixon*, 329 F. Supp. 672 (N.D. Cal. 1971) (holding that no proposition has been found to suggest that a United States District Court may compel the head of the Executive Branch of government to take any action whatsoever). But see *Hourigan v. Carter*, 478 F. Supp. 16 (N.D. Ill. 1979) (holding that mandamus can only be used to compel ministerial and non-discretionary duties).

41. Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 4, *Nixon v. Fitzgerald*, (No. 79-1738), *cert. denied* (1980).

42. *Id.* at 5.

43. *Id.*

appearance, but that it did involve "personal factors unique to him."⁴⁴ The Commission ordered him reinstated in another position equivalent to the one he held plus back pay; Fitzgerald was not satisfied with what he believed was an inadequate ruling.⁴⁵ Fitzgerald filed suit against several Nixon White House staff members and eventually, in 1978, amended his complaint to include President Nixon.⁴⁶ President Nixon's motion for summary judgment (claiming presidential immunity) was denied, giving him the opportunity to make a collateral appeal which was dismissed summarily.⁴⁷ The Supreme Court of the United States heard arguments, and eventually ruled that the President enjoys absolute immunity for official actions he commits while President.⁴⁸ The Court developed its rationale using precedent and history. The ruling in *Fitzgerald* can be summed up as follows:

Applying the principles of our cases to claims of this kind, we hold that the petitioner, as a former President of the United States, is entitled to absolute immunity from damages predicated on his official acts. We consider the immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history⁴⁹

The Court examined the powers and responsibilities of the President and held that the President's powers are unique as compared to other executive officers because the President has the responsibility to execute the nation's laws as well as shape United States foreign policy.⁵⁰ Fitzgerald argued that the only immunity mentioned in the Constitution is reserved for

44. *Id.* at 6.

45. *Id.*

46. Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 6, *Nixon v. Fitzgerald*, (No. 79-1738), *cert. denied* (1980). Fitzgerald also filed suit against Bryce Harlow and Alexander Butterfield, two of Nixon's top aides. The Supreme Court ruled in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), that cabinet members and aides are only entitled to qualified immunity, which would be denied only if the official reasonably should have known that his or her act was a violation of law. See Aviva Orenstein, *Recent Development, Presidential Immunity From Civil Liability*, 68 CORNELL L. REV. 236, 240-42 (1983).

47. *Nixon*, 457 U.S. at 731.

48. *Id.* at 749.

49. *Id.*

50. *Id.* at 749-50; see also *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (holding that executive officials are usually entitled only to qualified immunity).

Congressman and presidential immunity must not have been considered.⁵¹ The Court did not agree and listed several reasons why Fitzgerald had to be wrong. First, because presidential immunity is not specifically mentioned in the Constitution does not mean it does not exist.⁵² The Court noted judges have immunity even though the Constitution does not specifically grant such a privilege.⁵³ Second, the Court already has extended to certain executive branch officials (i.e., prosecutors) absolute immunity.⁵⁴ Finally, there is historical evidence that the Framers assumed the President has immunity.⁵⁵ Senator Ellsworth and Vice President John Adams, both delegates to the Constitutional Convention, believed the President was not subject to the Court's jurisdiction.⁵⁶ Alexander Hamilton, noted in the *Federalist*, that an executive who is not independent will equate to a weak government.⁵⁷ Thomas Jefferson, the nation's third President, wrote the following to the prosecutors in Aaron Burr's trial:

The leading principle of our Constitution is the independence of the legislature, executive and judiciary. But would the executive be independent of the judiciary, if he were subject to the commands of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, help him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?⁵⁸

To summarize its position, the Court quoted Joseph Story, a nineteenth century commentator, who observed:

There are incidental powers belonging to the executive department which are necessarily implied from the nature of the functions which are confided to it. Among these must necessarily be included the power to perform them

51. *Nixon*, 457 U.S. at 750; see U.S. CONST. Art. I, § 6 (guaranteeing immunity in all cases, except treason, felony, and breach of the peace, from arrest during a congressional session).

52. *Nixon*, 457 U.S. at 750 n.31

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 751 n.31. For more historical commentary on immunity, see Memorandum (Attachment) in Support of President Clinton's Motion to Dismiss on Grounds of Presidential Immunity at 1, *Jones v. Fitzgerald* (No. LR-C-94-290) (1994) [hereinafter President's Attachment].

57. President's Attachment, *supra* note 56, at 4-5.

58. *Nixon*, 457 U.S. at 751 n.31 (1982) (quoting 10 WORKS OF THOMAS JEFFERSON 404 (P. Ford ed. 1905)).

without any obstruction whatsoever. The President cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office, and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.⁵⁹

VI. RECENT DEVELOPMENTS

Paula Corbin Jones, a former Arkansas state employee, filed suit against President Clinton claiming that while governor of Arkansas, Clinton violated her equal protection and due process rights by making "noncoercive sexual advances."⁶⁰ Jones claims that she rebuffed Governor Clinton's advances and as a result, her superiors treated her in a "hostile and rude manner" and she was denied merit pay raises.⁶¹ Jones voluntarily left her state job in 1993.⁶² She filed her complaint one day short of the three year statute of limitations, which incidentally was the year and a half point of Bill Clinton's presidential term.⁶³

President Clinton moved to dismiss the complaint arguing the precedent of *Nixon v. Fitzgerald* gave the President absolute immunity from civil suit.⁶⁴ The district court ruled that since the actions allegedly committed by the President occurred before his term of office commenced, the President, under the constitutional doctrine of separation of powers, is only entitled to "limited or temporary" immunity from immediate trial but discovery and deposition may proceed against the President.⁶⁵ In January

59. JOSEPH STORY, COMMENTARIES OF THE CONSTITUTION OF THE UNITED STATES 418-19 (1st ed. 1833); see *Nixon*, 457 U.S. at 776-77.

60. Memorandum in Support of President Clinton's Motion to Dismiss on Grounds of Presidential Immunity at 15, *Jones v. Ferguson* (No. LR-C-94-290) (1994) [hereinafter President's Memorandum].

61. *Id.* at 16.

62. *Id.* at 17.

63. *Id.* at 63.

64. *Id.* at 18.

65. *Jones*, 869 F. Supp. at 697-99. Prior to this case, there have only been three Presidents sued for actions they allegedly committed before they assumed office. *People ex rel. Hurley v. Roosevelt*, 179 N.Y. 544 (1904). In *Hurley*, Theodore Roosevelt, was a member of the Board of Police for the New York City Police Department before he assumed the Presidency. A suit was filed against Roosevelt and the other members when a patrolman believed that he was unjustly dismissed. The suit was resolved in the Board's favor. The New York Court of Appeals, without opinion, affirmed the lower court's decision. In *Devault v. Truman*, 194 S.W.2d 29 (Mo. 1946), President Harry Truman was sued because of a decision he made as a state court judge in 1931. The dispute was resolved in Truman's favor with no mention of presidential immunity. In *Bailey v. Kennedy*, No. 757,200 (Cal. Super. Ct. 1962), President John Kennedy was sued when delegates to the prior Democratic Party Convention used a car they claimed was given to them by high ranking members

of 1996, this decision was reversed in part by an appeals court, which ruled that *Fitzgerald* does not protect actions outside the outer perimeter of the President's office and thus Bill Clinton, individually, is subject to trial for actions he allegedly committed before he became president.⁶⁶ As such, the absolute immunity *Fitzgerald* provided the President has at least, for the time being, been strictly applied to provide immunity only for official actions committed while in office.

Before discussing *Fitzgerald*, the District Court spent a significant amount of time discussing the "English Legacy." The Court believed that the question concerning immunity lies within English law.⁶⁷ The Court noted English law, which is the cornerstone of American law, eventually stood for the proposition the king is under no man, but under God and the law.⁶⁸ At the same time, the Court noted the Petition of Rights,⁶⁹ signed by King Charles I, made it apparent the king's prerogative was limited and he would be subject to the law.⁷⁰ Examining the steady decline of the king's divine right, the Court concluded that through the reception statutes which allowed, as of a certain date, English common law and acts of parliament to be received in new independent states, the rights of the President would by implication not exceed the rights of the weakened monarch in the early seventeenth century.⁷¹

of the Democratic Convention. The plaintiffs argued they were injured when the defendant's "agents" negligently operated the car. President Kennedy made a motion to stay the proceedings on the basis of the Soldier and Sailors Civil Relief Act of 1940, which gives serviceman the right to stay proceedings while on active duty. He argued that as Commander-in-Chief of the armed forces, he also enjoyed such a privilege. The trial court denied his motion and the case was settled out of court. See Statement of Interest of the United States, Brief of Solicitor General at 1, *Jones v. Clinton*, 869 F. Supp. 690 (E.D. Ark 1994) (No. LR-C-94-290) (Solicitor Gen. Brief 1994).

66. *Jones v. Clinton*, Nos. 95-1050, 95-1167 1996 WL 5658 at *6 (8th Cir. Ark.). President Clinton's lawyers plan to appeal to the full appeals court whose decision will possibly be reviewed by the United States Supreme Court. See Mimi Hall, *Court: Paula Jones' Suit Can Go to Trial*, USA TODAY, Jan. 10, 1996, at 4A.

67. *Jones*, 869 F. Supp. at 692.

68. *Id.* at 693.

69. The Petition of Rights was a further restraint on arbitrary government. The Petition condemned taxation without Parliament's consent, imprisonment without showing cause, quartering of soldiers, and the misuse of martial law. By 1689, the Bill of Rights was passed by Parliament. See A.E. DICK HOWARD, *MAGNA CARTA-TEXT AND COMMENTARY* 26-27 (1964).

70. *Id.*

71. *Jones*, 869 F. Supp. at 693. The court stated the following:

The events of this period in English legal and political history were conclusive in determining the end of 'the divine rights of Kings' and subjecting the King to the law. This is historically important to us in that the founding fathers cast very little light (outside the impeachment provision) upon suits against the President, and this matter was never addressed by Congress in passing laws enacted pursuant to the Constitution.

The "English Legacy" helped the Court determine the extent of Presidential immunity. The lofty Seventeenth Century English statement that "the King ought to be under no man, but under God and the law"⁷² appears to coincide with the modern American proposition the President is not above the law.⁷³ Though both statements are egalitarian, to some they may appear to be ludicrous and simply naive. Was the Monarch ever held to the law? As a result of the "down-sizing" of the Monarch's divine right during the Seventeenth Century, the Court reached the conclusion that if the monarch is not above the law, neither is the President.⁷⁴ Though it is true that the monarch's divine right has been effectively abrogated, it can not be accurately stated the British Monarch is entirely under the law.

VII. THE BRITISH COUNTERPART⁷⁵

The United Kingdom of Great Britain and Northern Ireland is a nation immersed in stately tradition preceding the Constitution of the United States by hundreds of years. The formation of Great Britain's legal system can be traced to the passage of the Magna Carta.⁷⁶ The Magna

"It must be assumed that the rights of the President do not rise above the rights of an English monarch in the early 17th Century."(emphasis added).

Id. at 693-94 n.1. *But see Nixon v. Fitzgerald*, 457 U.S. 731, 748 (1982). The court stated the following:

Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional heritage and structure. . . . This inquiry involves policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers.

Id. The Supreme Court apparently wanted to de-emphasize the importance of English political tradition, a tradition which the Founding Fathers no doubt wanted to abandon. The Founding Fathers instead created a system of government that mandates that the three branches be separate in identity, but equal in power. The United Kingdom does not adhere to such a concept. This is evident, as explained later, by the fact the executive powers of the United Kingdom are exercised by the governing party in Parliament.

72. Statement was originally coined by Henry Bracton, a 13th Century legal scholar. Sir Edward Coke, who served as Queen Elizabeth's attorney and was later Chief Justice of the King's Bench, stated to King James I that "Bracton saith, Quod Rex non debet esse sub homine, sed sub deo et lege" [That the King ought not to be under any man, but under God and the law]. *See Jones*, 869 F. Supp. at 693 n.1 (quoting DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 203 (1963)).

73. *See Fitzgerald*, 457 U.S. at 758 n.41

74. *Jones*, 869 F. Supp. at 696.

75. Many Commonwealth nations have laws regarding immunity and for a discussion on these similarities and differences, see COLIN MCNARIN, *GOVERNMENTAL AND INTERGOVERNMENTAL IMMUNITY IN AUSTRALIA AND CANADA* 3 (1977).

76. BOYD C. BARRINGTON, *THE MAGNA CHARTA AND OTHER GREAT CHARTERS OF ENGLAND* 5 (1899).

Carta is one of the most significant documents ever introduced to the people of England,⁷⁷ who had no rights except for what the king saw fit to give.⁷⁸ The Magna Carta, which was approved by King John in 1215,⁷⁹ guaranteed certain rights to the barons and eventually to all the people of England.⁸⁰ On that fateful day, the principle was established that the king cannot override the law;⁸¹ thus the king's tyrannical right to rule by arbitrary decisions ended.

By 1688, the English Parliament, which did not exist when the Magna Carta was signed in 1215, became the supreme law making body of England.⁸² Though Parliament's ascendancy overshadowed the powers of the monarch, there was an aspect of the monarch's divine right that has always remained, despite what others may believe. This "holdover" has given the Queen,⁸³ and the Crown as a whole, unique privileges, which the United States President will never have.

VIII. THE EXECUTIVE POWERS OF THE CROWN

The American system of government is based upon the concept of separation of powers. The United States Constitution mandates that the

77. Representing eighty percent of the population of the United Kingdom, England is simply one country out of four that comprises the United Kingdom. Wales came under the rule of the English Crown in the thirteenth century and formally entered the union by 1536. Scotland, which shared the same king of England since 1603, formally joined the United Kingdom of Great Britain in 1707. Ruled by the English Crown since the twelfth century, Ireland formally joined the union in 1800. In 1922, the Irish Free State separated from the United Kingdom. The six counties of the North (Northern Ireland) remained a part of the United Kingdom. See COLIN C. TURPIN, *BRITISH GOVERNMENT AND THE CONSTITUTION* 218-39 (2d ed. 1990).

78. BARRINGTON, *supra* note 76, at 5

79. King John (1167-1216) ruled England upon the death of his brother Richard in 1199. John, who was involved in a war with France, levied heavy taxes in order to support his military efforts. In 1214 John returned to England after being defeated by France. With widespread discontent by his barons (who renounced their allegiance to John), as well as by the Church of England, John agreed to accept the demands of his barons and had his seal affixed to the Magna Carta on June 19, 1215. See HOWARD, *supra* note 69, at 8-9.

80. HOWARD, *supra* note 69, at 8-10. The Magna Carta granted such important rights as tax relief from the king (chapter 12), the location of courts in certain jurisdictions (chapter 17), reasonable fines and punishments (chapter 20), compensation for taking private property (chapter 28), a free person will not be punished except by lawful judgment of his peers and by the law of the land (chapter 39), availability of justice (chapter 40), and freedom to leave and re-enter the kingdom (chapter 42).

81. NORMAN WILDING & PHILIP LAUNDY, *AN ENCYCLOPEDIA OF PARLIAMENT* 379 (1961).

82. TURPIN, *supra* note 77, at 24. The Bill of Rights required the consent of Parliament before taxes were levied. See HOWARD, *supra* note 69, at 26.

83. The current Queen, Elizabeth II, has been Queen of the United Kingdom of Great Britain and Northern Ireland since the death of her father, King George VI, in 1952. The Queen, as well as past queens and kings, is also known as the Monarch or Sovereign.

executive, legislature, and the judiciary have mutually exclusive members, and at times, mutually exclusive responsibilities which prohibit one branch from encroaching upon the powers of another. In the United Kingdom, this concept is not as definite. The legislative body of Parliament makes the laws, the Crown, headed symbolically by the monarch and steered by specific members of Parliament, has the authority and power to enforce the laws. Specifically, the Crown consists of the Monarch, ministers, who are usually sitting members of Parliament, the Central Governmental Departments (civil service), and the armed forces.⁸⁴ The Monarch is the incarnation of the Crown and could not be separated from that body. The Crown's powers include the prerogative powers of the Monarch, the executive powers exercised by her ministers, the civil service, and the armed forces.

The United Kingdom without a king or queen would be like the United States without a president; the nation would not function within its constitutional system of government. Though the current Queen is perceived as a symbolic figure of days long gone, her role in certain matters is constitutionally mandated.⁸⁵ The Queen is given the prerogative power⁸⁶ to dismiss her ministers,⁸⁷ or the Prime Minister, if either were to lose the support of the government.⁸⁸ Similarly, the Queen is also given the opportunity to appoint the Prime Minister, but such selection is governed by convention which mandates that she appoint the person who can command the confidence of the majority party in the House of Commons, usually the party leader.⁸⁹ The Queen is the only person who

84. See DAVID C. M. YARDLEY, INTRODUCTION TO BRITISH CONSTITUTIONAL LAW 38 (5TH ed. 1978). In several Commonwealth nations, the term Crown is also used in the same manner. For purposes of this article, unless otherwise noted, the term Crown will be used to refer only to the executive branch in the United Kingdom.

85. TURPIN, *supra* note 77, at 150-51.

86. Common law powers, not already delegated by Parliament, may only be exercised by the Sovereign. Such powers would include, among other things, the power to make treaties, recognize foreign governments, grant a royal pardon, etc. See *Blackburn v. Attorney-General* [1971] 1 WLR 1037 (CA).

87. A minister is a member of the Prime Minister's cabinet. The Prime Minister and cabinet ministers are collectively referred to as the "Crown's Ministers."

88. TURPIN, *supra* note 77, at 150-51. Though the Queen is given such powers, in political reality and necessity, the Prime Minister would offer his resignation or call for a dissolution of Parliament.

89. *Id.* at 146. The queen cannot appoint anyone she wants to the office of Prime Minister, but in 1957 and 1963 she was given the rare opportunity to solely appoint a prime minister when the majority party did not have an apparent leader. Today this opportunity would be diminished by internal party rules which guide the Queen in her selection. Since 1957, Labor party rules prohibit a member of the Labor Party to sit as prime minister without first being elected party leader. See PETER BROMHEAD, *BRITAIN'S DEVELOPING CONSTITUTION* 27-29 (1974).

may dissolve Parliament, but such action may only be taken if the Prime Minister requests a dissolution.⁹⁰ Nevertheless, it has been asserted by British Constitutional experts⁹¹ that the Queen may have the right to refuse a Prime Minister's request for dissolution.⁹² Though Governor-Generals⁹³ in several commonwealth nations have refused Prime Ministerial requests for dissolution, the Sovereign in the United Kingdom has not refused one since the passage of the Reform Act of 1832.⁹⁴ The Queen has the power to dismiss her ministers, and it appears that convention would allow her to do so if she felt that it were necessary but in practice the Prime Minister is the one who actually dismisses a minister.⁹⁵

The Queen does not have the power to alter the law, but she does retain a prerogative power by Order of Council⁹⁶ to legislate and regulate matters not already governed by statute.⁹⁷ The Crown may extend its sovereignty and jurisdiction to areas of land or sea which it has not

90. TURPIN, *supra* note 77, at 155. The Prime Minister would seek a dissolution of Parliament if he or she no longer commanded the confidence of their party.

91. GEOFFREY MARSHALL ET AL., SOME PROBLEMS OF THE CONSTITUTION 40-41 (5TH ED. 1971) quoted in TURPIN, *supra* note 77, at 156.

92. TURPIN, *supra* note 77, at 155-56.

93. In commonwealth nations that recognize the Queen as their Sovereign, the Governor-General is the person, usually appointed by the Prime Minister, who wields the power of the Crown in the Queen's absence. See WILDING, *supra* note 81, at 272-73.

94. TURPIN, *supra* note 77, at 155-56 (relying on Sir Peter Rawlinson, *Dissolution in the United Kingdom*, 58 THE PARLIAMENTARIAN 1, 2 (1977)).

95. TURPIN, *supra* note 77, at 150-51. Since the passage of the Reform Act of 1832, no Sovereign has ever dismissed a Prime Minister in the United Kingdom. In 1975, the Governor-General of Australia, Sir John Kerr, acting in the name of the Queen, dismissed the Prime Minister and all ministers in the Labor government when they no longer could govern effectively. The Governor-General wrote the Prime Minister the following:

In accordance with section 64 of the Constitution I hereby determine your appointment as my Chief Advisor and Head of government. It follows that I also hereby determine the appointments of all the Ministers in your Government. You have previously told me that you would never resign an election...or a double dissolution and that the only way in which such an election could be obtained would be by my dismissal of you and your ministerial colleagues. You have persisted in your attitude and I have accordingly acted as indicated. I propose to send for the Leader of the Opposition and to commission him to form a new caretaker government until an election can be held.

Id. at 152.

96. Orders of Council are made by the Privy Council. Privy Council membership is partly governed by convention. Conventional council members include past and present Ministers, the Archbishops of Canterbury and York, the Speaker of the House of Commons, and any other distinguished person who the Queen may appoint. Membership is for life. The Council, which has several hundred members, meets in full upon the death or coronation of the Monarch. Smaller committees meet when they need to exercise the Monarch's Royal Prerogative. Membership in the council is for life. YARDLEY, *supra* note 84, at 43-44.

97. TURPIN, *supra* note 77, at 382-83.

previously claimed or exercised sovereignty or jurisdictions.⁹⁸ During the Falkland Island conflict in 1982, the government used the prerogative of the Crown to requisition ships in "any of the Channel Islands, any colony, any country outside Her Majesty's dominions in which Her Majesty has jurisdiction in right of the Government of the United Kingdom."⁹⁹ But perhaps the most important power the Queen retains is the right to refuse to assent to legislation passed by Parliament. However, this veto power has not been exercised by a monarch in over two hundred years.¹⁰⁰

The monarch, though no longer omnipotent, has enough power if used unwisely to halt the workings of the government and cause a constitutional crisis. The executive powers formally exercised by the sovereign alone are now in the hands of the ministers of the Crown, namely the Prime Minister.¹⁰¹

The Prime Minister is usually a member of the House of Commons.¹⁰² As such, his discretion and powers are for the most part unlimited. The British Constitution gives the Prime Minister the power to request a dissolution of Parliament and call a general election.¹⁰³ The Prime Minister, who is an elected member of Parliament, chairs the cabinet meetings, appoints ministers,¹⁰⁴ and has the authority to intervene in virtually all matters of government and foreign relations.¹⁰⁵ Whereas the President of the United States has the unfettered discretion to dominate the executive branch and matters of foreign policy, the Prime Minister, by Great Britain's formal lack of separation of powers, occupies a dual role which allows the office holder to dominate the executive as well as legislative functions of government. Though some may want to call the Prime Minister a "first among equals," in fact the Prime Minister could easily be considered a "constitutionally elected dictator."

As shown, the Queen has a considerable amount of constitutional power. Yet, unlike the President of the United States, the Queen can do

98. *Post Office v. Estuary Radio Ltd.*, [1968] 2 QB 740, 753.

99. TURPIN, *supra* note 77, at 383-84.

100. *Id.* at 96. See also RODNEY BRAZIER, CONSTITUTIONAL PRACTICE 189-90 (1994).

101. *Id.* at 158.

102. *Id.* at 176.

103. RICHARD ROSE, PRESIDENTS AND PRIME MINISTERS 8 (Richard Rose & Ezra A. Suleiman, eds., 1980). Section 7 of the Parliament Act, 1911, mandates that Parliament will automatically dissolve in exactly five years from the last general election if the monarch has not dissolved Parliament sooner. See YARDLEY, *supra* note 84, at 14.

104. ROSE, *supra* note 103, at 22.

105. TURPIN, *supra* note 77, at 176.

no wrong.¹⁰⁶ This ancient maxim, which stems from the days when the monarch ruled by divine right, persists today,¹⁰⁷ but now although the Queen can do no wrong, her ministers personally, as well as the government can.¹⁰⁸

The Crown Proceedings Act of 1947¹⁰⁹ played a significant role in allowing suits to be brought against the Crown.¹¹⁰ Prior to the Act, no proceedings for criminal or civil actions could be brought against the Crown.¹¹¹ Thus, a servant of the Crown who committed an illegal action pursuant to duty, would bear the sole responsibility for that action because "the Crown can neither commit nor authorize nor be responsible for any wrongdoing"¹¹² The 1947 Act allowed civil proceedings by and against the Crown or governmental agencies,¹¹³ whereas prior to the act, one used a petition of right¹¹⁴ to seek relief against the Crown. Presently, one may directly sue the Crown via an appropriate governmental department or agency by permitting actions to be brought against the Crown for torts committed by its servants or agents for any breach of its

106. See *M. v. Home Office*, [1993] 3 All E.R. 537, 551; SIR DAVID LINDSAY KIER, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485*, at 528-29 (9th ed. 1969); see also R.J. Gray, *Private Wrongs of Public Servants*, 47 CAL. L. REV. 303, 305, 307 (1959); W.S. Holdsworth, *The History of Remedies Against the Crown*, 38 LAW Q. REV. 280, 293 (1922).

107. See *Home Office*, [1993] 3 ALL E.R. at 540.

108. H.W.R. Wade, *Injunctive Relief Against the Crown and Ministers*, 104 LAW Q. REV. 4, 5 (Jan. 1991).

109. For purposes of the immediate discussion, the pertinent parts of this act are as follows: Section one allows a subject to sue the Crown directly except for actions which the Crown remains privileged from legal action for damages, for the recovery of a liquidated sum, for specific performance, and for contracts dependent on money from Parliament. As such, no soldier may sue the Crown because the control of the armed forces are still under the prerogative power of the Crown. Section two permits actions to be brought against the Crown for torts committed by servants or agents for any breach of its duties. Section two did not remove the right to sue the actual tortfeasor. Section seventeen provides for the minister of the Civil Service to publish a list of authorized government departments so that civil proceedings against the Crown may be brought against the appropriate department or if no department exists, the Attorney General. Section forty of the act preserves the monarch's personal immunity from civil actions. See *Home Office*, [1993] 3 All E.R. 537, 554; YARDLEY, *supra* note 84, at 129-30.

110. KIER, *supra* note 106, at 528.

111. *Id.*

112. *Id.* at 528-29.

113. *Id.* at 529.

114. A petition of right is a method by which an aggrieved subject would petition the Crown for relief. This method was at one time the only way to obtain relief and a judgment against the Crown, which the Crown did not have to satisfy. The Crown Proceedings Act did away with this method. It should be noted that the Crown has traditionally been cooperative in taking responsibility for the actions of its servants and that the petition of right proceeding usually proceeded as ordinary actions between subjects. See *Id.*; see also Holdsworth, *supra* note 107, at 290.

duties that give rise to tortious liability.¹¹⁵ At the same time, this Act does not prevent a minister from being held personally liable for his own tortious actions.¹¹⁶ However, unlike the President of the United States, the Queen, or the reigning monarch, can never be held personally responsible in a civil court for torts committed by her.¹¹⁷

IX. JUDICIAL REVIEW OF THE CROWN

As in the United States, the powers of government are subject to judicial control.¹¹⁸ In the United Kingdom, executives are generally immune from the control of the courts so long as their actions are within the parameters of the law.¹¹⁹ As such, decisions by a minister or other public authority are not subject to appeal, but a person may challenge the exercise of a minister's powers by means of judicial review.¹²⁰ The courts have the power to order a public authority to perform a duty, by a writ of mandamus, or to refrain from unlawful action, by a writ of prohibition. The courts also have the power to create an order which annuls a decision made contrary to law, by a writ of certiorari, to make a declaration of a party's legal rights, or impose an injunction,¹²¹ which until recently was not available against the Crown or ministers acting on behalf of the Crown.¹²²

The right to enjoin a minister of the Crown and hold that minister or his department in contempt for violating an injunction was decided in the benchmark case of *M. v. Home Office*.¹²³ M was a citizen of Zaire who arrived in the United Kingdom and claimed political asylum.¹²⁴ After several months of review, his claim was rejected by the Secretary of State who made plans to deport M back to Zaire.¹²⁵ M's solicitors made application for leave to apply for judicial review.¹²⁶ On the evening M was

115. *Home Office*, [1993] 3 All E.R. at 554; see also PETER W. HOGG, LIABILITY OF THE CROWN, *infra* note 161, at 7.

116. *Home Office*, [1993] 3 All E.R. at 554 (citing § 2 of The Crown Proceedings Act of 1947).

117. YARDLEY, *supra* note 84, at 130; GRAY, *supra* note 105, at 307.

118. TURPIN, *supra* note 77, at 414.

119. LORD MACDERMOTT, PROTECTION FROM POWER UNDER ENGLISH LAW 81 (1986).

120. TURPIN, *supra* note 77 at 414.

121. *Id.* see also *Home Office*, [1993] 3 All E.R. at 558-60.

122. *Home Office*, [1993] 3 ALL ER at 558-560.

123. *Id.*

124. *Id.* at 542-43.

125. *Id.*

126. *Id.*

to be deported, the judge indicated he believed that there was an arguable point arising out of the application and that he wanted M to remain in the United Kingdom so M's application could be made to a nominated judge.¹²⁷ The judge adjourned the Court session believing that pending a further hearing, M would not be removed from the United Kingdom.¹²⁸ Due to miscommunication between M's solicitors, the Home Office, and the judge, M was deported against the wishes of the Court.¹²⁹

Proceedings were commenced on behalf of M against the Secretary of State for contempt in failing to comply with the judge's order.¹³⁰ The counsel for the Home Office argued an injunction could not be used against ministers of the Crown in judicial review proceedings, and thus the order of contempt which the Court of Appeals upheld against the Home Secretary was in error.¹³¹ The House of Lords unanimously found the Home Office, and not the Home Secretary personally, in contempt because the office inadvertently violated the judge's order not to deport M.¹³² The House of Lords, speaking through Lord Woolf, held language in Section 31(a) of the Supreme Court Act of 1981 gives the courts the right to make coercive orders, such as injunctions, against ministers of the Crown in judicial review proceedings.¹³³ Furthermore, under Rules of the Supreme

127. *Home Office*, [1993] 3 All E.R. 537.

128. *Id.*

129. *Id.* at 546-47.

130. *Id.*

131. *Id.* at 541-42.

132. All E.R. Annual Review 1993, *Contempt of Court* 106.

133. *Home Office*, [1993] 3 All E.R. at 538, 555-560; *see also* Supreme Court Act 1981, § 31, *reprinted in* 11 HALSBURY'S STATUTES 991 (4th ed. 1991). Relevant parts of § 31 read as follows:

Application for judicial review-1) An application to the High Court for one or more of the following forms of relief, namely-a) an order of mandamus, prohibition, or certiorari; b) a declaration or injunction under subsection 2; or c) an injunction under section 30 restraining a person not entitled to so from acting in an office to which that section applies, shall be made in accordance with rules of court by a procedure to known as an application for judicial review. 2) A declaration may be made or an injunction granted under this subsection in any case where an application for judicial review, seeing that relief, has been made and the High Court considers that, having regard to a) the nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition, or certiorari; b) the nature of the persons and bodies against whom relief may be granted by such orders; and c) all the circumstances of the case, it would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be. . . .

Id. But *see* Section 21(2) of the Crown Proceedings Act of 1947, *reprinted in* 13 HALSBURY'S STATUTES 20 (4th ed. 1991) which states the following:

The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order

Court Order 53, r 3(10), which was given statutory authority by Section 31 of the Supreme Court Act of 1981, the court can grant interim injunctions against ministers as well as make a finding of contempt against the minister or his government.¹³⁴

This decision directly conflicted with an earlier House of Lords decision rendered by Lord Bridge in *Factortame Ltd. v. Secretary of State for Transport*,¹³⁵ which refused to accept the notion that Section 31 allows injunctions in judicial review proceedings to be made against the Crown or a minister of the Crown acting in their official capacity.¹³⁶

Lord Bridge's decision was based partly on the notion that Section 31 of the Supreme Court Act did not expressly extend the right for a judge to order an injunction against a minister of the Crown in judicial review proceedings.¹³⁷ At the same time, his reasoning in *Factortame* relied

would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown.

Id.

134. *Home Office*, [1993] 3 All E.R. at 563. R.S.C Ord. 53, r 3(10) states the following:

Where leave to apply for judicial review is granted, then (a) if the relief sought is an order of a prohibition or certiorari and the court so directs, the grant shall operate as a stay of the proceedings to which the application related until the determination of the application or until the court otherwise orders; (b) if any other relief is sought, the court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ.

Id.

135. *Factortame Ltd. v. Secretary of State for Transport*, [1989] 2 All E.R. 692, 703-08. The European Economic Community attempted to conserve fish stock by means of national quotas. Not a member of the EEC at the time, Spain fared poorly under the quota system. Several Spanish fishing companies attempted to secure part of the British quota by buying pre-existing British fishing vessels or re-registering their vessels under the British flag. To prevent, this "quota-hopping," the Secretary of State for Transport promulgated regulations under which a fishing vessel could only qualify for entry on the new British register if its legal title was at least 75% British owned. The applicants, who believed that the nationality requirements were unjust and against Community Law, applied for judicial review. The Divisional Court decided to obtain a preliminary ruling from the European Court of Justice (ECJ), but such a ruling would take several years. The Divisional Court granted interim relief ordering the regulations to be "disapplied." The House of Lords in *Factortame*, held that the court did not have the power under English Law to make an interim order displacing an act of Parliament. Nevertheless, the House of Lords referred the matter back to the E.C.J.. Meanwhile, due to another proceeding challenging the regulations (see Case 246/89 *Commission v. United Kingdom*), the E.C.J. made an interim order that the Secretary's regulations concerning the nationality requirements must be suspended. Subsequently, the E.C.J. ruled in *Factortame Ltd. v. Secretary of State for Transport* (No 2) Case C-213/89 [1991] 1 All E.R. 70 that a national court was obliged to set aside a national law if such a law was sole obstacle preventing it from granting relief under Community Law. See All E.R. Annual Review 1990, *European Community Law* 104-05; TURPIN, *supra* note 77, at 346-47.

136. *Home Office*, [1993] 3 All E.R. at 561.

137. *Id.*

heavily upon a lower court decision in *Merricks v. Heathcoat-Amroy*,¹³⁸ which seemed to suggest, contrary to the opinion of Lord Woolf, that a minister can not be under a personal liability and subject to injunctive relief for wrongs committed by a minister in his official capacity.¹³⁹ Lord Bridge's decision was further influenced by the Law Commission's 1976 report which recommended that Section 21 of the Crown Proceedings Act of 1947 needed to be amended so courts may grant such injunctions against the Crown.¹⁴⁰

Lord Woolf respectfully doubted Lord Bridge's reasoning in *Factortame* and held the language of Section 31 of the Supreme Court Act of 1981 allowed courts to render injunctions against the Crown in judicial review proceedings and that RSC Ord 53, r 3(10) allowed the courts to grant interim injunctions against the Crown. In an important caveat, Lord Woolf stated an injunction still could not, pursuant to Section 21(2) of the Crown Proceedings Act of 1947, be handed down to the Crown or a minister of the Crown in civil suits.¹⁴¹

Lord Woolf believed that just because judicial review was not introduced through primary legislation, it does not necessarily limit the scope of Section 31 of the 1981 Act.¹⁴² Perhaps to avoid delay, England and Wales decided that an amendment to the Rules of the Supreme Court should precede primary statutory legislation. Thus, the Law Commission's recommendation to amend Section 21 of the 1947 Act was effectively abandoned.¹⁴³ At the same time, the need to amend Section 21 was not necessary because it dealt with civil proceedings, not judicial review proceedings.¹⁴⁴ According to Lord Woolf, "order 53 undoubtedly

138. *Merricks v. Heathcoat-Amroy*, [1955] 2 All E.R. 453.

139. *Home Office*, [1993] 3 All E.R., at 557 (relying on *Merricks v. Heathcoat-Amroy*, [1955] 2 All E.R. 453). The plaintiff in *Heathcoat* sought an injunction against the Minister of Agriculture, Fisheries, and Food both in his personal and official capacity. The minister argued that the court had no jurisdiction over him in his official capacity because the court was not allowed to grant an injunction against a minister. The minister also argued that if he acted personally, the court did not have jurisdiction over him because he was a member of Parliament and had parliamentary privilege. The court agreed with his argument. *Home Office*, [1993] 3 All E.R. at 557.

140. *Home Office*, [1993] 3 All E.R., at 561. The Law Commission's 1976 report preceded RSC (Rules of the Supreme Court) Ord. 53, which was the precursor to the Section 31 of the Supreme Court Act of 1981. The report suggested that the lack of jurisdiction by the courts should be addressed by amending Section 21 of the 1947 Act. The report was never implemented and instead the Rules of the Supreme Court were amended. *Id.*

141. *Id.* at 564. Lord Woolf noted that a declaration is still the appropriate remedy on an application for judicial review involving officers of the Crown. *Id.*

142. *Home Office*, [1993] 3 All E.R., at 562.

143. *Id.*

144. *Id.* at 563.

extended the circumstances in which a declaration could be granted against the appropriate representative of the Crown."¹⁴⁵ This was confirmed by the passage of the Supreme Court Act of 1981.¹⁴⁶ Lord Woolf noted that as a matter of construction, it would be difficult to treat Section 31 and order 53 as not applying to ministers.¹⁴⁷ To support that proposition, Lord Woolf turned to the Northern Ireland Act of 1978, which was not discussed in *Factortame*, which recognizes the limits of the 1947 Act, but gives the court the ability to bind the Crown in non-civil proceedings (i.e., judicial review).¹⁴⁸ That Act gives the court a wide discretion to grant interim relief, which would seem to confirm that injunctions in judicial review proceedings may be granted against ministers in Northern Ireland.¹⁴⁹ By implication, such remedies would likely be available in England and Wales.¹⁵⁰ Lord Woolf further reasoned the Rules of the Supreme Court, order 53, r 3(10) have always been treated as giving the Court jurisdiction to grant interim injunctions¹⁵¹ which is linked to the power of the court to grant final injunctions.¹⁵² In sum, Lord Woolf wrote the following:

I am, therefore, of the opinion, that the language of s 31 being unqualified in its terms, there is no warrant restricting its application so that in respect of ministers and other officers of the Crown alone the remedy of an injunction, including an interim injunction, is not available. In my view, the history of prerogative proceedings against officers of the Crown supports such a conclusion. . . .¹⁵³

Perhaps another reason the House of Lords ruled against the Home Office was the fact that since the judgment of *Factortame* was rendered,

145. *Id.*

146. *Id.*

147. *Home Office*, [1993] 3 All E.R. at 563.

148. *Id.*

149. *Id.*

150. *Id.* Lord Woolf noted that Scotland's position would be different. See TURPIN, *supra* note 77, at 415.

151. *Home Office*, [1993] 3 All E.R. at 563 (relying on *R. v. Kensington and Chelsea Royal London BC*, ex p Hammell, [1989] 1 All ER 1202, [1989] QB 518).

152. *Home Office*, [1993] 3 All E.R. at 563-64 (relying on Supreme Court Act of 1981, Section 37(1)): "The High Court may by order (whether interlocutory or final) grant an injunction . . . in all cases which it appears to the court to be just and convenient to do so." *Id.*; see also *Chelsea Royal London BC*, ex p Hammell, [1989] 1 All E.R. 1202, [1989] QB 518.

153. *Id.* at 564.

the European Court of Justice ruled in *Factortame* 2¹⁵⁴ that a national court must set aside national legislative provisions if it was the sole obstacle in granting interim relief in a case concerning community law.¹⁵⁵ It would appear ironic to have one remedy available for domestic law and another available for Community law. This is apparent by the statement made by Lord Woolf in *M v. Home Office*: "It would be most regrettable if an approach which is inconsistent with that which exists in community law should be allowed to persist if this is not strictly necessary."¹⁵⁶

Though the constitutional aspects of Lord Woolf's decision are tremendous, the practical effects are minimal because the Crown has always been cooperative with court rulings. In the beginning of his opinion, Lord Woolf stated, "[t]his was the first time that a minister of the Crown had been found to be in contempt by a court. . . ."¹⁵⁷ At the same time, the above decision does not seem to directly affect the Queen since most of her executive duties are in the hands of her ministers.

X. OTHER IMPORTANT PRIVILEGES

In the United Kingdom, laws passed by Parliament do not personally apply to the Queen, or even the Crown as a whole, unless otherwise specifically mentioned by express words or by necessary implication. This means a statute would only bind the Crown if the intent of the statute would be frustrated without the Crown being bound to its provisions.¹⁵⁸ In *Madras Electric Supply Co. v. Boarland*,¹⁵⁹ the Privy Council considered the liability of the appellant to pay income tax and found it necessary to explain and uphold the Queen's, and the Crown's, right not to pay income tax.¹⁶⁰ The qualified immunity from statute allows

154. *Factortame Ltd.*, 2, Case C-213/89 [1991] 1 All E.R. 70; see also *Factortame Ltd.*, 2 All E.R. 692.

155. *Id.* at 102. See also TURPIN, *supra* note 77, at 346-47.

156. *Home Office*, [1993] 3 All E.R. at 564.

157. *Id.* at 541.

158. TURPIN, *supra* note 77, at 141 (relying on *Province of Bombay v. Municipal Corp. of Bombay*, [1947] AC 58 (PC)).

159. *Madras Elec. Supply Co. v. Boarland*, [1955] AC 667 (PC).

160. The decision of this case is now moot. In 1992, the Queen voluntarily agreed to pay income tax on her private holdings. See *Prince Charles Wants to Reduce Royalty*, USA TODAY, Oct. 31, 1994, at 2D. Prince Charles, the Queen's son and heir to the throne, has also agreed to pay tax (forty percent) on his main source of revenue, the Duchy of Cornwall. Charles was previously paying only twenty-five percent tax on the Duchy. See Edward Verity & Richard Kay, *Charles Slices Back His Tax*, DAILY MAIL, May 16, 1994, at 15. The above changes have fueled a movement in Canada for the Governor-General to pay income tax on his \$97,375 salary. Since 1953, Governor-Generals in Canada have only paid tax on their private holdings. See Joan Bryden, *Reform Demands Tax Hike for Governor General*, CALGARY HERALD, Feb. 8, 1995, at A3.

the Queen, and the Crown, to escape the operation of certain laws, even criminal laws.¹⁶¹

The criminal prosecution of a defendant is handled by various offices, notably the Crown Prosecution Service, and is tried in the Crown Court.¹⁶² At the same time, the maxim, "the Queen can do no wrong" creates a legal fiction which would seemingly prevent any member of the Crown from being tried in Crown courts. However, several courts in other Commonwealth jurisdictions have determined it is legally possible for the Crown to be prosecuted.¹⁶³ As discussed above, the Crown may be held to the requirement of a statute if the statute specially applies to the Crown.¹⁶⁴ In a benchmark ruling handed down by the Australia High Court, the Court ruled there is a strong presumption that the Crown is not bound by the criminal laws.¹⁶⁵ The same conclusion was reached in the Canadian case *Canadian Broadcasting Corp. v. Attorney General*.¹⁶⁶ However, both cases suggest that a criminal statute may apply to the Crown if the statute specially pertains to the Crown.¹⁶⁷ Nevertheless, it appears the only sanctions that may be handed down are monetary because the Crown cannot be imprisoned.¹⁶⁸ It should be noted that ministers of the Crown are personally subject to all laws.¹⁶⁹ However, whereas

161. TURPIN, *supra* note 77, at 144; see PETER W. HOGG, LIABILITY OF THE CROWN 232-234 (1989).

162. See FOREIGN & COMMONWEALTH OFFICE, JUSTICE AND THE LAW 21-22 (MAY 1993).

163. HOGG, *supra* note 161, at 234.

164. See FOREIGN & COMMONWEALTH OFFICE, *supra* note 162, at 55, see also TURPIN, *supra* note 87, at 146. Certain public health authorities that once enjoyed Crown immunity may be subject to criminal action for breach of public health legislation. See HOGG, *supra* note 161, at 234. Though the Crown may be bound by statute through necessary implication, it is very rare due to the narrow definition of "necessary implication" in *Bombay* (see note 150 above) and the fact that most penal sanctions cannot be handed down to the Crown. See HOGG, *supra* note 161, at 234.

165. See MCNAIRN, *supra* note 77, at 87-89 (relying on *Cain v. Doyle*, 72 C.L.R. 409 (1946)); See also FOREIGN & COMMONWEALTH OFFICE, *supra* note 162, at 55.

166. *Canadian Broadcasting Corp. v. Attorney General*, [1959] S.C.R. 188.

167. HOGG, *supra* note 161, at 234. In some cases it may be inferred that a statute binds the Crown through necessary implication. Very few statutes, however, bind the Crown in this manner because of the narrow definition of necessary implication in *Bombay*, as well as the presence of penal sanctions in a statute that make it nearly certain that the Crown is not to be bound. *Id.*

168. *Id.* at 235.

169. Home Office, [1993] 3 All ER at 540

[J]udges cannot enforce the law against the Crown as monarch because the Crown as monarch can do no wrong, but judges enforce the law against the Crown as executive and against the individuals who from time to time represent the Crown If the minister has personally broken the law, the litigant can sue the minister in his personal capacity.

ministers can personally be separated from the Crown and stand trial for their unlawful acts which exceeds the scope of their office, the Queen can not separate herself from the Crown because she is the personification of the Crown. Thus, it appears, using the above rationale the Queen may be subject to monetary criminal sanctions but she can never be imprisoned.¹⁷⁰

In the United States, statutes using the word "persons" are construed to exclude the government.¹⁷¹ Nevertheless, there is no definitive and fast rule on the subject, and the conventional interpretation of the word "person" may be disregarded if the scope and intent of the statute is meant to attach to the government.¹⁷² As such, the above rule appears to be no different than the rule of law in the United Kingdom, but there is one important difference in its application. No person in an individual capacity is free from the requirements of the law. If the President of the United States committed a crime, he would have to be impeached before the government could conduct a criminal proceeding.¹⁷³ The structure of the British system would make the separation of monarch from Crown constitutionally impossible to separate. Thus, the reigning could theoretically break a law without incurring any serious legal consequence.¹⁷⁴

XI. CONCLUSION

As discussed above, the Queen,¹⁷⁵ unlike the President of the United States, is personally immune from liability for all torts she commits. Furthermore, section 40(2)(f) of the Crown Proceedings Act of 1947 establishes "Crown Immunity," which appears to establish a

170. See HOGG, *supra* note 161, at 233 ("But where a fine is an alternative penalty, or the only penalty, then the provision could apply to the Crown, just as it could apply to a corporation (which also can not be imprisoned)").

171. *Will v. Michigan Dept. State Police*, 491 U.S. 58 (1989).

172. *United States v. Cooper Corp.*, 312 U.S. 600 (1941).

173. See President's Attachment, *supra* note 57, at Section 10 (arguing that Vice President Spiro Agnew did not have to be impeached before being indicted, former Solicitor General and Appeals Court Judge Robert Bork cited the records of the Constitutional Convention which led to the formation of Article I, Section 3, Clause 7 of the United States Constitution which maintains that only the President must be impeached before the courts hand down an indictment). President Clinton perhaps used Bork's theory to show that if the President must be impeached before he is indicted, then there is no possibility that the President has to stand trial in a mere civil suit.

174. The Crown, if it broke the law, would be subject to the pressure of adverse public opinion, which could be more damaging than penal sanctions.

175. The rights the Queen enjoys are exclusive to her alone. Nevertheless, it could be argued that governor-generals and lieutenant-governors, who fulfill the functions of the Sovereign in Commonwealth nations, are beyond the reach of the courts for the duration of their term. See Gray, *supra* note 106, at 308.

rebuttable presumption that the Queen (and members of the Crown) have personal immunity from the requirements of statute unless that statute specifically states otherwise, or if the intent of the statute would be frustrated if the Crown did not have to abide by it.¹⁷⁶ At the same time, it appears that the Queen, and the Crown, enjoy immunity from most criminal proceedings, but unlike the Prime Minister and other members of the Crown, the Queen can never be imprisoned. The American President does not enjoy these three privileges.

Though the Queen's divine right to rule has been irreversibly weakened, it appears that she personally obeys the law, and perhaps exceeds the requirements of the law as a matter of grace, and not through the legal coercion the President is subjected too. Furthermore, unlike the President, who cannot serve more than two four-year terms, the British monarch rules for life. It is hard to reconcile the British position that the "king is under no man, but under God and the law" when the monarch enjoys such unique personal privileges. The same cannot be said about the President, who must, at times, submit to the jurisdiction of the courts for wrongful actions he commits outside the scope of his office. The difference in the immunity given to the President and the Queen is remarkable since the President holds the world's most powerful office. Thus, it can easily be reconciled why the President deserves the immunity that he is given, whereas the immunity afforded to the Queen appears only the result of tradition which conflicts with the tenets of a modern democratic society.

176. TURPIN, *supra* note 77, at 142. The Act states that it will not "affect any rules of evidence or any presumption relating to the extent to which the Crown is bound by any Act of Parliament." *Id.*